No. 15446 (In Admiralty)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. Muna, deceased, *et al.*,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.
Hon. Thurmond Clarke, Judge.

BRIEF OF APPELLEE TRANSOCEAN AIR LINES, INC., A CORPORATION.

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I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

Appellee Transocean Air Lines, Inc., a corporation, hereinafter referred to as Transocean, accepts the jurisdictional statement on pages 1, 2 and 3 of the appellant's opening brief.

II.
STATEMENT OF THE CASE.

A. The Questions Involved and the Manner in Which They Have Been Raised.

Appellants have set forth five specifications of errors (Op. Br. p. 7), although only two questions on appeal are raised on page 6 of the opening brief, it being claimed that the doctrine of *res ipsa loquitur* applies to a suit in admiralty for the death of a passenger in an airplane crash on the high seas, and that under the evidence in this case the appellants were entitled to a judgment despite the findings of the trial court in favor of the respondent. Actually, there is only one question presented by the specifications of errors and the points on appeal, *i.e.,* was the evidence sufficient to sustain the findings of fact, conclusions of law and judgment in favor of the respondent Transocean.

B. Introduction to Statement of Facts.

The voluminous transcript demonstrates a thorough and substantial conflict in the evidence which is not accurately reflected in appellant's opening brief.[1]

One fact is crystal clear. A Transocean airplane with 50 passengers and a crew of 8 persons, including 3 pilots, left the Island of Wake, bound for Honolulu, and disappeared shortly thereafter. Some of the bodies were found, together with small portions of the wrecked air-

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[1]"Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point and not merely his own evidence."

Slovick v. James I. Barnes Construction Co. (1956), 142 Cal. App. 2d 618, 622, 298 P. 2d 923.

craft. The record is devoid of evidence indicating the cause of the disaster.

Preliminarily it may be observed that appellants among other things assert that the auto-pilot was improperly maintained, that the pilots were inadequately trained in emergency procedures, and were scheduled to fly an excessive number of hours. There was a conflict of evidence on all these points.

C. Statement of Facts.

1. General Nature of Transocean Operation.

Transocean conducted a large operation, with principal bases in Oakland and Burbank, California, and with bases in Honolulu, Guam and Wake Island, as well as Tokyo and other points in the Orient [p. 44].

In July, 1953, the month of the fateful crash, Transocean maintained facilities at Oakland, where they had 10 electricians, including 4 instrument men, as well as numerous mechanics [pp. 208-209]. They were equipped to make complete changes, work on automatic pilots and to do any other necessary maintenance work.

Facilities at Burbank were maintained by respondent Slick, the latter company being paid $23,000.00 a month for maintaining the airplane in question [p. 45]. Slick's facilities had been thoroughly investigated and found adequate. Their library contained all the necessary manuals relating to the maintenance of the aircraft [p. 764].

Transocean maintained in addition, bases at Honolulu, where the personnel was approximately 25 persons, at Wake Island, where the personnel was 75 to 80 persons, and at Guam, where the personnel was 15 to 20 persons, in each instance mechanics and other qualified persons

being a part of the personnel capable of making engine changes, tire changes, replacing or working on the automatic pilot, and any other portion of the airplane [p. 726.]

2. The Aircraft.

The aircraft was a Douglas DC-6 purchased from Slick, which was converted by Douglas from a cargo plane to a passenger plane. It was a type of plane customarily used throughout the world for the carriage of passengers and freight.

As a part of normal operating procedure in both Service and commercial flying, it is customary for the pilots to indicate in the ship's log any discrepancies that need correcting. These are termed in the industry. "squawks." *Everything* is put down, whether it is a broken light bulb or something really serious [p. 683].

Appellants particularly complain of the automatic pilot, and cite a history of squawks relating to this particular instrument. Whatever problems may have existed in the past, the evidence is undisputed that on June 2, 1953, the automatic pilot was removed from the plane at Oakland by witness Babb and completely overhauled. Prior to October of 1953 the Civil Aeronautics Authority had not issued a repairman's certificate. As soon as they came out, however, in October, this man received such a certificate. Babb was amply qualified. He had been working on automatic pilots of the same type as were installed in the aircraft in question, since 1947 [p. 202]. He had received training in a trade school, at the Iowa State College for the Navy, had attended the gyro compass school for the Navy, the DC-6 school and the Slick Airways School [p. 197], in addition to a Navy in-

structor's school. He had schooling from a Bendix representative on the auto pilot [p. 198]. On June 2, this witness worked on the auto pilot and overhauled the altitude control unit [p. 239]. He discovered that the autyson rotor bearings were frozen. These bearings were replaced and the system checked and found to be satisfactory. The unit was reinstalled in the airplane and checked in the plane [p. 240]. This particular autyson was standard and was used in many similar instruments and the witness was thoroughly familiar with its overhauling [p. 242]. He tested the altitude control as prescribed in the overhaul manual [p. 242] and subjected it to various tests. He tested the altitude control in the airplane and it worked satisfactorily. He was of the opinion that if there was any other component that was not working, it would have shown up in the operation of the auto-pilot [p. 250]. He checked out the overpowering mechanism and determined that the auto-pilot could be manually overpowered without excessive pressure, and that it did not overpower too easily; in other words, that there was sufficient control [p. 278]. This work was likewise checked out by witness George Shaw, an inspector with Transocean, who had a background of training at Cal Aero Tech and the Navy [p. 322]. It was the witness' opinion that the overhaul which had been done by Babb had corrected any trouble in the instrument [p. 335]. He observed the mechanic put the system through its ground run [p. 338]. *There is no record of any further squawk by any of the pilots with reference to the auto-pilot following the overhaul of June 2.*

During the month of July 1953, the airplane was flown on July 2nd from Oakland to Burbank, on July 4 from Burbank to Oakland, and then to Honolulu. On July 5,

from Honolulu to Wake Island, and then to Tokyo, with a return trip to Wake Island on July 6. On July 6 the plane was flown to Honolulu and then to Oakland, where it arrived on the 7th, after which it was flown to Burbank. On July 8, the plane was flown from Burbank to Oakland and then on July 9 to Honolulu, where on the same day it returned to Burbank. On July 10, the plane was flown from Burbank to Oakland, from Oakland to Honolulu, and on July 11 to Guam and then on July 12 to Wake Island, where, en route to Honolulu, the plane disappeared.

It is significant to note that during the entire month of July, although there were minor squawks of various types with reference to the plane, which were corrected, not only single mention appears of any malfunctioning of the auto-pilot or any of its component parts.

Captain Keating flew the plane during the fore-part of July and had used the automatic pilot and had experienced no difficulty with it [p. 728]. Captain Buckelew, an experienced flier, flew the plane on July 10, 1953, from Oakland to Honolulu, a flight of 10 hours and 5 minutes [p. 675]. He did not recall any difficulty in connection with the operation of the plane on that trip [p. 677]. Buckelew testified that if there had been anything unairworthy about the craft he would have so stated to Captain Word [p. 685]. There is no evidence to indicate that any of the pilots on the trip from Oakland to Honolulu, from Honolulu to Guam or from Guam to Wake Island, had any problem whatsoever with the automatic pilot. From this evidence alone, the trial court could reasonably conclude that Babb's overhaul had eliminated any problem with the automatic pilot.

3. The Last Flight From Point of Departure at Oakland on July 10, 1953.

The evidence is uncontradicted that on July 10, 1953, the plane departed from Oakland Airport for Honolulu, the flight being designated as No. 109. This flight was in charge of Captain Buckelew, an experienced pilot and a good friend of Captain Word, the pilot on the fatal flight. Captain Buckelew flew the plane to Honolulu, where it was taken over by Captain Wm. L. Word, First Officer Herbert A. Hudson, Second Officer Leonard H. Nowell, Navigator John Hoy, Flight Engineer George Haaskamp, Student Flight Engineer Paul Yedwabnick, a flight purser and a stewardess. All these persons were well known to Captain Buckelew [pp. 670-672]. In the opinion of the witness, Captain Word and the members of the crew appeared to be fresh. In his opinion at the time the aircraft was turned over to Word, it was in an airworthy condition [p. 685]. This was the crew on duty at the time of the fatal flight.

The evidence was uncontradicted that all three of the pilots were experienced pilots. While the total flying time of none of these men is reflected in the record, it is obvious that even in DC-6 equipment alone, their flying experience had been considerable. Thus, Captain Word had DC-6 flight time of 712 hours; Officer Hudson had 529 hours in DC-6 equipment, and Officer Nowell had 699 hours in DC-6 equipment.

Captain Word was described by one witness as being a very good pilot—conservative, knew his business [p. 577]. Captain Keating testified that Word and Hudson were excellent pilots [p. 732]; that Officer Nowell was a good pilot [p. 736]; that Flight Engineer Haaskamp

was an excellent flight engineer. He was described as being above average.

The flight from Honolulu to Guam was uneventful. Don Carson, the dispatcher at Guam on July 11, actually observed the plane land [p. 629]. The passengers were helped off the aircraft and the witness talked to the crew [p. 632]. The flight logs and the weather were discussed with the members of the crew. No complaints of any kind were made with reference to the functioning of the aircraft.

The crew was in good spirits and none appeared to be ill [p. 634], and none appeared to be suffering from pilot fatigue [p. 634]. The crew was taken in two vehicles to the Transocean headquarters in the mountains. They were fed and after a brief "bull session" the crew broke up and went to bed. The following morning the crew was awakened and driven to the airport. Everyone looked normal and rested and nobody appeared tired [p. 640]. The crew went to the office and the witness was in contact with all members of the crew and observed their physical condition during a period of approximately an hour and a half before the flight. He noticed nothing unusual about their physical condition [p. 641]. He was a very good friend of all members of the crew. The plane was put through a pre-flight check and sounded satisfactory. He observed the take off and noticed nothing unusual about the take off or the attitude of the plane [p. 646].

A short time later the plane landed at Wake Island.

Harry Wood, a mechanic employed by Transocean at Wake Island, and whose duty it was to service and maintain the aircraft, observed the plane land at Wake Island

[p. 699]. He checked immediately with the flight engineer and Captain Word and there were no complaints with reference to the plane [p. 702]. He went over the matter of possible discrepancies with the flight engineer, Haaskamp, and was advised that there was no malfunctioning or discrepancies in the aircraft. In checking the log, Wood did not observe any squawks or complaints other than the left main inboard tire, which showed some signs of wear [pp. 705-706]. The evidence was uncontradicted that a worn tire would have no bearing of any type upon the airworthiness of the plane [p. 705]. The ground checks made of the plane before its departure were satisfactory [p. 709]. He fully and completely checked the airplane before departure [pp. 703-704].

While a good deal of appellants' brief is devoted to a long excursion into the voluminous records relating to the particular plane, going back for a period of days, weeks, months and even years before the accident in question, the fact remains that the plane was constantly serviced by both Slick and Transocean and that the arrival at Guam was *uneventful* as well as the departure from Guam and the arrival at Wake Island. At the time of the departure from Wake Island, the crew appeared to be in good spirits. There is no evidence of any problem on the flight between Guam and Wake Island, nor is there any evidence of any problem developing after the take off at Wake Island, during which time position reports were given on two occasions.

At Wake Island, several of the ground crew were deeply conscious of the departure of this particular plane since it contained at least a dozen members of families departing from the Island, with whom they were thoroughly familiar, as well as the crew, who were good friends

of the witnesses that testified. It is fair to infer that none of the ground crew, faced with the obligation of correcting any known flaws in the plane, would have permitted this particular plane under these circumstances to have departed without taking every possible precaution.

4. Question of So-called Pilot Fatigue.

The crew in question boarded the airplane in Honolulu and flew to Guam where they were taken from the air field in two automobiles to quarters where they were appropriately fed. The uncontradicted evidence is that they had ample rest and opportunity for rest and that the following morning, the day of the fateful flight, they had breakfast, and that at that time they appeared to be rested and there was no evidence of any fatigue [p. 638]. This testimony came from persons who were experienced in the observation of pilots and persons engaged in the flying of aircraft and who would clearly be in a position to know about fatigue and the effects of fatigue on an individual.

5. The Auto-pilot.

Some of the evidence relating to the auto-pilot has already been referred to. There is no evidence indicating that in fact the auto-pilot was in use at the time of the disappearance of the plane. Its use is *optional* with the pilot, who may or may not see fit to use the instrumentality. In any event, the plane had been flown from Honolulu to Guam to Wake Island with no evidence of any problem in connection with the auto-pilot. At the time of the last radio check in, there was no mention of any difficulty with the auto-pilot. Appellees' employees are of course entitled to the presumption that they take ordinary care for their own concerns and that they obey

the law, and it must therefore be presumed that if there had been any difficulty with the auto-pilot as a result of the long flight from Honolulu to Guam, or from Guam to Wake Island, the crew would have called attention of this fact to the ground crew at either Guam or Wake Island, so that the needed repairs could be made. There is no evidence of any such request.

Appellants are lost in a maze of material, which, though interesting, is purely speculative insofar as the particular crash in question was concerned.

It is quite obvious that at the time of the last report, the plane had just reached its cruising altitude. What the pilot did with reference to the auto-pilot at that point is of course pure speculation. The evidence is uncontradicted that in any event there are at least four separate and independent methods by which the pilot or co-pilot could immediately disengage the auto-pilot so that the plane would be operated manually, much the same as an automobile with power steering, where the power steering for some reason failed.

There are at least four methods by which the pilot or co-pilot may disengage the auto-pilot. See testimony of Buckelew [p. 680]; testimony of Keating [pp. 729-730]. Babb testified that there were four ways in which the auto-pilot could be disengaged [p. 287]. There is a switch on the pedestal, a disengaging switch on the pilot's control wheel, a disengaging switch on the co-pilot's control wheel, and the manual disengaging of the servos by the pilot's left hand [p. 289].

If the pilot controls the plane with the auto-pilot disengaged, no malfunctioning of the auto-pilot could in any way effect the operation of the plane [p. 290]. The pilot

can overpower the auto-pilot *at any time* by merely grabbing the controls, which are checked every time the auto-pilot is checked [p. 291]. Babb testified that he had never heard of a pilot's disconnect buttons becoming inoperative [p. 293].

Tracy, the appellants' expert witness, testified that if there was any malfunctioning of the auto-pilot [p. 268] there would in all reasonable probability be some indication of that fact to the pilot [pp. 268-269]. He testified that:

> "At any time there is any indication of any whatsoever malfunctioning about the auto gyro it *can be taken over and handled manually by the pilot or the co-pilot*" [p. 271, lines 12-15].

6. Provision for Rest Facilities.

Appellants make a number of claims with respect of provision of rest facilities. The evidence relating to the facilities at the Island of Guam has already been set forth in great detail. Appellants assert that there should have been more than one bunk on this aircraft. Their own witness, Tracy, admitted that with three pilots the usual practice would be for one member to rest and the other two pilots operate the plane [p. 274, lines 6-15]. The evidence is undisputed that there was such a bunk for the pilot.

It is also asserted that it would have been good practice to change crews at Wake Island (Op. Br. p. 10). The evidence from Captain Keating was that where there was a two pilot crew, the crew would be changed at Wake Island, but that if it were a multiple crew, they would not change. The answer is obvious. With a multiple crew, the pilots can rotate a rest period in the bunk provided for that purpose [p. 756].

Preliminary Observations Relating to the Power of the Appellate Court in Admiralty Cases.

While it is contended by appellants that they are entitled to a trial *de novo* upon the evidence, this proposition has been recently rejected by the Supreme Court in the case of *McAllister v. United States,* 348 U. S. 19, at page 20:

> "The first question presented is whether the Court of Appeals in reviewing the District Court's findings, applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the Appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. *Boston Insurance Co. v. Dehydrating Process Co.,* 204 F. 2d 441, 444 (C. A. 1st Cir.); *C. J. Dick Towing Co. v. The Leo,* 202 F. 2d 850, 854 (C. A. 5th Cir.); *Union Carbide and Carbon Corp. v. United States,* 200 F. 2d 908, 910 (C. A. 2d Cir.); *Koehler v. United States,* 187 F. 2d 933, 936 (C. A. 7th Cir.); *Walter G. Hougland, Inc. v. Muscovalley,* 184 F. 2d 530, 531 (C. A. 6th Cir.), cert. denied, 340 U. S. 935; *Petterson Lighterage and Towing Corp. v. N. Y. Central R. Co.,* 126 F. 2d 992, 994-995 (C. A. 2d Cir.)."

See also:

United States Lines Co. v. Cummings (9th Cir.), 195 F. 2d 221, 223;

City of Portland v. Luckenback Steamship Co., 217 F. 2d 894, 897.[2]

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[2]As the court stated in the *City of Portland v. Luckenback* case at page 897: "Portland's two experts look fine on paper. Maybe they didn't look so good to the trial judge as he saw them in the witness box."

ARGUMENT.

I.

The Trial Court Committed No Error in Connection With the Application of the Doctrine of Res Ipsa Loquitur.

The appellants basically present two questions on appeal. (Op. Br. p. 6.) It is the contention of the appellants that the trial court erred in failing to apply the doctrine of *res ipsa loquitur*. Although at one stage of the case, appellants' counsel asked the court whether or not in its opinion the doctrine of *res ipsa loquitur* applied, and the court at that time stated that he did not think so [p. 90], there is nothing in the record to indicate that the trial court did not in fact at the *conclusion* of all of the evidence, apply the doctrine of *res ipsa loquitur*.[3]

That this is clear is indicated from the notice of motion filed by appellants to include in the record a statement of decision, and wherein the appellants sought after the determination of the case upon the merits, a statement by the court with reference to whether or not the court had applied *res ipsa loquitur*.

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[3]The actual remarks of the court were as follows:

"The Court: I said that if I ruled on that, it would shorten the case, and I said I felt it didn't apply, so we will proceed with the trial.

Mr. Blackman: Is the question of the applicability of res ipsa loquitur *still open for consideration at a later date?*

The Court: Yes, certainly.

Mr. Blackman: I see." [p. 90].

Appellants counsel *fully* argued *res ipsa loquitur* in both his arguments to the court, see particularly the closing argument [pp. 882-888], wherein counsel cited a New York case relating to the application of the doctrine [p. 888] and handed the volume to the court [p. 919]. The record shows that at the time of the submission of the case the court retained this volume of the New York Reports [p. 919].

In support of that motion, the appellants filed a memorandum of points and authorities [Tr. p. 55, Vol. I] where they themselves recognized the problem. Appellants stated at that time:

> "For if they were refused the doctrine in the trial court, but without any record to show it, the Appellate Court will assume that they received the benefit of the doctrine in the trial court. Accordingly, the question of its applicability will never be finally passed upon by appeal."

There is a dearth of authority relating to the question of the applicability of the doctrine of *res ipsa loquitur* in admiralty cases. In at least one case, *Smith v. Penna. Central Air Lines,* 76 Fed. Supp. 940, the court stated:

> "It is true that the doctrine of *res ipsa loquitur* has never been applied to loss of life at sea. The reason for this difference in the law is not found in any distinction of principle, but is of a purely historical nature. The liability of common carriers for loss of life and personal injuries on the high seas is governed by the law of admiralty and not by the common law. These two systems of jurisprudence had varying origins and developed along different lines. Maritime law has always been solicitous of the interests of ship owners, as one of its purposes has been to encourage the building up of the merchant marine.
>
> "Consequently, the liability of ship owners to their passengers and members of their crews has been very much circumscribed not only in respect to the right of recovery, but also in respect to the amount that may be recovered."

Other cases have indicated that the doctrine of *res ipsa loquitur* may be applied to admiralty, but that the doctrine is of less potency than is to be found in other courts.

Particularly would this be true with reference to California, where the doctrine has perhaps achieved its maximum recognition and force in the 48 states. The District Court sitting as a court in admiralty, however, was not required as it would have been in a civil case, to follow the extremely broad and liberal doctrine of *res ipsa loquitur* as enunciated by the California decisions. That there is a difference between admiralty and the law side of the court is well set forth by Judge Mathes in the case of *Kunkel v. United States,* 140 Fed. Supp. 594, where the court states:

> "Against the contention that the difference between the law side and the admiralty side of the court is of no material consequence, that the difference between an action at law and a suit in admiralty is but a mere technicality, stands the rejoinder of the venerated law professor that the distinction may be so considered, if one can consider the difference between a boy and a girl to be but a mere technicality."

The rule is well set forth in the case of *George Technical Corporation of Delaware v. Pure Oil Company,* 196 F. 2d 199 at 205.

> "But the doctrine as expounded by the Supreme Court, and to be applied in admiralty, has less potency than is given it in some other courts. It suffices to cite three recent cases: *Sweeney v. Erving,* 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815; *Jesionowski v. Boston & Maine R. R.,* 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416; *Johnson v. United States,* 333 U. S. 46, 68 S. Ct., 391, 92 L. Ed. 468, the last a suit in admiralty. The effect of them is to hold that the doctrine is not a rule of law, but a principle of evidence useful to aid in making a *prima facie* case, but that it does not change ultimately the burden of proof on the plaintiff to show negligence in the defendant; and

when the evidence is all in, the question still is whether all the evidence, in the light of common experience, reasonably shows that the defendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved."

There has been considerable conflict in the reported cases with reference to the applicability of the doctrine of *res ipsa loquitur* to aircraft in any event. See for example:

Wilson v. Colonial Air Transport (Mass.), 180 N. E. 212;

Herndon v. Gregory (Ark), 81 S. W. 2d 244;

Smith v. Whitley (N. C.), 27 S. E. 2d 442;

Boulineaux v. City of Knoxville (Tenn. App.), 99 S. W. 2. 557;

Budgett v. Soo Sky Ways (S. D.), 266 S. W. 2d 53;

Deojay v. Lyford (Me.), 29 A. 2d 11;

Towle v. Phillips (Tenn.), 172 S. W. 2d 806;

Cudney v. Mid-Continent Air Line (Mo.), 254 S. W. 2d 662.

Even assuming that the doctrine applied, it does not relieve the appellant, as the Supreme Court of the United States has pointed out, of the burden of establishing negligence. The rules relating to the obligation of the defendant in cases where the doctrine of *res ipsa loquitur* may properly be said to be applied, vary from state to state, and from jurisdiction to jurisdiction. There can be no question but that with the watered down version of the rule of *res ipsa loquitur* as applied in admiralty, the defendant cannot be charged with the burden of explaining the cause of the accident or catastrophe.

Obviously there were no eye witnesses to the accident, and since not enough of the debris was discovered to make an intelligent inspection of the remaining portions of the plane, it was impossible for the defendant to establish the actual cause of the accident. It would be possible to speculate and to envision countless reasons for the strange disappearance of the craft. Appellants are speculating that *perhaps* the airplane may have been on auto-pilot; that *perhaps* something went wrong with the auto-pilot which the three pilots were unable to control despite the availability of four separate and distinct methods for disengaging the auto-pilot; that *perhaps* the crew was so fatigued that every one of the crew suddenly and inexplicably lost the ability at the same moment to respond to external stimuli; that *perhaps* some emergency was presented which in some fashion could have been averted if one of the members of the crew had gone to all of the ground school courses on emergency training instead of taking part of his course in the manner described in the transcript; that *perhaps* there was something about the pre-flight check when the plane departed from Guam that may have contributed to something which caused the plane to suddenly crash.

Appellants would have us speculate and believe that under no circumstances was there any evidence of sabotage or explosion, merely because on 14 of the bodies unidentified, there appeared to be, according to an autopsy surgeon, no evidence of explosive forces. There is nothing to indicate what happened to the other members of the group of 58 persons aboard, nor in what condition their bodies actually were at the time they hit the water. Appellants would like to speculate and assume that the plane crashed in an almost vertical position. Experiences with aircraft are strange and unusual. It is common knowledge

for example, that any number of crashes have occurred by reason of peculiar circumstances. Thus, in a recent case, a man was convicted of planting dynamite on board a plane, where his mother was a passenger, so that he might collect the insurance. If this plane had landed at sea instead of on the land, where the pieces of the plane might be surveyed and inspected, it could well be that the loss of the plane would forever be a mystery. It is common knowledge that recently in Southern California, and fortunately for the other passengers, a man sealed himself in the lavatory of a plane and apparently exploded some type of charge which blew him out of the plane. The damage was such that there was no explosion inside the plane and the pilots were able to successfully bring the plane to the ground. In other cases it is common knowledge that aircraft have disappeared without apparent cause. Sudden tropical storms, lightning, small foreign aircraft, guided missiles, flying saucers, crazed passengers, a sudden fire in a cockpit, or explosion in the cockpit which would not affect the bodies in the plane, and unrelated to any negligent conduct on the part of the aircraft owners or operators, are possible illustrations of causative factors.

It would be possible to conjecture endlessly on the possibilities inherent in this situation. Such resorts to fancy, however, cannot solve the problem.

Even assuming that *res ipsa loquitur* was properly applicable, the trial court was clearly entitled to apply the presumption of due care on the part of the airmen.[5] This would eliminate any charge of negligence on the part of

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[5]*United States v. Fotopulos,* 180 F. 2d 631 (9th C. C. A.). *Orbach v. Zern,* 138 Cal. App. 2d 178.

the crew. Even appellants' witness Tracy testified that usually there is a period of preliminary warning involved before any operational malfunction would become critical [p. 285]. It would be presumed that during such period the crew exercised ordinary care; yet no radio communication was received. Where the inference of negligence is opposed to the presumption of due care it becomes a question of fact for the trial court as to which should be followed.

Scott v. Burke, 39 Cal. 2d 388; 247 P. 2d 313.

Appellee Transocean would likewise be entitled to the benefit of the presumption that their employees, the crewmen, had in fact exercised ordinary care for their own concerns.

Appellants contend that the pilots and other members of the crew were inadequately trained in emergency procedures. They cite in support of this proposition the fact that several members of the crew had missed one or two sessions during the course which was given by Slick for the benefit of all personnel.

Whether the failure of the particular pilot or crew members to attend a given class had any significance insofar as negligence or causal connection was concerned, was a question of fact for the trial court. There was a conflict in the evidence in any event, since there was evidence that Captain Keating had given a review course to co-pilot Hudson of some 14 hours on a trip to Honolulu, as well as at the crew house in Honolulu [pp. 150-151]. Captain Keating personally gave instruction to Officer Hudson on

emergency procedures and it was his opinion that the man was a good pilot. McLain also gave co-pilot Hudson additional instruction on June 17, and 18, 1953, including emergency procedures [pp. 162-163].

Captain Keating further testified that Captain Word was an excellent pilot, fully acquainted with emergency procedures [pp. 732; 748].

Irrespective of whether Word had attended all the classes on emergency procedures, Captain Keating, who was in charge of the entire operation, had personally given Captain Word instructions on emergency procedures and had watched him perform these emergency procedures under simulated emergencies [p. 748], such as fires, fire control and engine out procedures [p. 749]. In addition, there were proficiency checks given approximately every six months.

The witness Buckelew likewise testified that he was well acquainted with Captain Word and that Word was thoroughly trained in emergency procedures [pp. 669-670].

It is well settled that before one can recover damages, he must establish by a preponderance of the evidence that defendant's negligence was the proximate cause of the injuries.

Nuber v. Royal Realty Co., 86 Cal. App. 2d 596; 195 P. 2d 501.

It is Hornbook law that proximate cause is a question for the trier of fact.

II.

There Is No Merit to the Suggestion That the District Court Erred in Making Certain Findings of Fact.

Rule 18.2 (d) of the Federal Admiralty Rules provides as follows: "In all cases when findings are specified as error, the specifications shall state as particularly as may be, wherein the findings of fact and conclusions of law are claimed to be error." Appellants have utterly failed to comply with this requirement of the rules and in any event have not shown how or in what respect any of the findings which are referred to on pages 50, 51 and 52 of the opening brief, even if unsupported by a preponderance of the evidence, could possibly bring about a reversal of the cause.

Appellants contentions with respect to the findings are without substantial merit.

Finding No. XIV is criticized, wherein it was found that no maintenance work was performed at Guam or Wake Island because none was required or necessary. This finding is supported by ample evidence from the witnesses who were produced from both Guam and Wake Island, indicating that other than a worn tire on one of the wheels, which could have no possible bearing on flight, there were no complaints of any kind or character with reference to the aircraft. The court could fairly infer from the evidence that the ground crews at Wake Island and Guam had conducted such inspections as are customary at those bases. The court could fairly infer that no repairs were necessary since no squawks of any kind were made by any member of the crew and that if there had been anything wrong with the plane, some type of complaint would have been made.

Finding No. XVIII is criticized. This finding relates to the take-off from Wake Island, at which time the total gross weight of the aircraft was found to be 94,397 pounds. No complaint is made of that portion of the finding. Obviously the remainder of the finding relating to the distribution of the load and the fact that it was within the allowable gross take off weight of 100,000 pounds, would amount to nothing more than surplusage in any event. Appellants do not contend in their brief that the plane was in any manner overloaded or that the load was not in fact properly distributed. It is well settled that findings on immaterial matters are to be disregarded.

Appellants complain of Finding No. XXI, wherein it was found that no primary structure of the aircraft was recovered and that therefore it was not possible to determine if a structural or mechanical failure of the aircraft occurred in flight.

It is submitted that this is a fair inference from the evidence. It is customary after aircraft accidents, to pick up the pieces as it were, and attempt to reconstruct them or analyze them, to the end that the cause of the crash may be ascertained if possible. Obviously, where no portion of the craft was discovered which would have shed any light upon structural or mechanical failure, it would be impossible to make any determination with reference to structural or mechanical failure.

Appellants complain of Finding No. XXII relating to the maintenance record of the aircraft. Basically this finding is true and accurate. The voluminous maintenance records introduced in evidence on this plane demonstrate every attempt to comply with standard procedures. Irrespective of the maintenance records, however, it is submitted that more crucial is the problem of the actual condi-

tion of the aircraft on its final flight from Oakland to its point of disappearance. The evidence amply demonstrates that the airplane was airworthy at all times during the final flight.

Finding No. XXV is attacked relating to rest periods. The evidence respecting this subject matter has been fully covered in this brief. There was ample evidence to support the trial court's conclusion that the crew had rested adequately and was in a proper state of health to continue with its duties and that there were adequate facilities for rest in flight.

Finding No. XXVI is attacked. The attack is purely carping. The witness Wood testified that the crew did not appear to be suffering from fatigue, illness, worry or disability of any nature. He was thoroughly familiar with the crew members as well as some of the passengers on board the fatal flight.

Finding No. XXVII is complained of, wherein it was stated that whatever occurred to cause the crash apparently occurred without giving any warning or opportunity for corrective action on the part of the crew. The evidence demonstrated that if the auto-pilot developed any malfunctioning, there would usually be sufficient time for the pilot or co-pilot to take such action as was indicated to disengage the auto-pilot and manually take over. Actually the finding is qualified by the word "apparently." The court could do nothing other than make a finding of this type, since obviously that was the only reasonable inference that the court could draw. Since the crew members were clothed with the presumption that they had exercised due care for their own concerns, it must be presumed that if they had opportunity to take corrective action, they would have done so. The fact that there was

no radio message would indicate that there was no opportunity for warning or other corrective action.

Finding No. XXVIII is attacked with reference to the probable cause of the accident being undetermined. This finding like the others is supported by ample evidence. Appellants, as in all of their complaints with reference to the findings, insist that this court re-try the case and take a view of the conflicting evidence which supports appellants' position. The trial court, based upon ample evidence, concluded that the cause of the accident could not be determined and that appellee was not negligent.

Finding XXIX is attacked relating to the qualification of the crew members and the training program of Transocean. The testimony of Captain Keating and Captain Buckelew demonstrates that this particular crew was well qualified and experienced. The evidence is uncontradicted that Transocean maintained a training program, and while there were discrepancies in the testimony relating to the periodic checks, the court could reasonably find that the training program was adequate and intended to keep the crew members on a high degree of proficiency.

The remainder of the findings complained of, Nos. XXX, XXXI, XXXIII, XXXV, XXXVI and XXXVII, all relate to similar matters where there was ample evidence to support the conclusion that Transocean was not negligent and that the airplane in fact was airworthy.

The basic issue to be determined by the trial court was the issue of fault, if any, on the part of appellee Transocean. It is well settled that it is only necessary to find on the ultimate facts, and it is not necessary to expressly find on the probative facts.

Rahlves and Rahlves, Inc. v. Ambort, 118 Cal. App. 2d 465.

Findings on immaterial facts, whether erroneous or otherwise, should be disregarded. No judgment should be reversed except for prejudicial error.

Federal Rules of Civil Procedure, Rule 61;

Drybrough v. Ware, 111 F. 2d 548;

Santa v. Nehi Corp., 171 F. 2d 696.

III.

There Was No Error in Failing to Make Findings of Fact and Conclusions of Law Relating to the Claims for Loss of Baggage and a Refund for the Fares Paid.

This action was commenced under the "Death on the High Seas" Act, 46 U. S. C. A. 761, *et seq.* Section 762 of that Act provides:

> "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . ."

Appellants have cited no responsible authority for their position with respect of the baggage, and the statute obviously was never intended to furnish recovery for such items of loss. The statute is solely a death statute and the damages are for the wrongful death and not for the loss of baggage. The pecuniary loss is that which is sustained by the persons for whose benefit the suit is brought. Obviously the pecuniary loss, if any, with respect of the baggage and the tickets was not sustained by the appellants herein. It is well settled that funeral expenses, for example, cannot be recovered under this Act since no pecuniary loss has been sustained by the person for whose benefit the suit is brought.

See:

The Culbersons, 61 F. 2d 194.

Conclusion.

It is respectfully submitted that the judgment of the rial court should be affirmed. Whether *res ipsa loquitur* pplied or not, the simple fact is that the ultimate burden f proving negligence rested upon the appellants. The rial court on an abundance of evidence has found that the lane was in an airworthy condition and that the appellee vas not negligent in connection with the operation or naintenance of the aircraft.

Respectfully submitted,

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